

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION**

WESTCHESTER FIRE INSURANCE COMPANY,)	Case No. 7:11-cv-00672-HMH
)	
)	
	Plaintiff,)
)	STIPULATION OF SETTLEMENT
v.)	
)	
SAMUEL F. EAKIN,)	
)	
	Defendant.)
)	

This Stipulation of Settlement is by and between plaintiff, Westchester Fire Insurance Company (“Westchester”), and defendant, Samuel F. Eakin (“Eakin”).

RECITALS

A. WHEREAS, Westchester executed, as surety, Subcontract Performance Bond No. K07190967 (the “Bond”) dated August 1, 2006 naming Kellogg Brown & Root, Inc. (also known as Kellogg Brown & Root Services, Inc.) (“KBR”) as obligee, and Sanders Bros., Inc.; (“Sanders”) as principal, in the penal sum of \$1,186,877.10, for Sanders’ performance of a subcontract with KBR dated July 24, 2006, for Subcontract 304-2994-US94-SC014 (the “Subcontract”) High Bay Underground Mechanical Electrical, Plumbing, Communications and Special Gases – Cape Canaveral Air Force Station, Florida.

B. WHEREAS, to induce Westchester to execute the Bond for Sanders, Eakin, individually as an indemnitor, executed an Agreement of Indemnity (the “AOI”) on or about March 3, 2006.

C. WHEREAS, by the terms of the AOI, Eakin assumed the obligation of principal under the Bond.

D. WHEREAS, under the AOI, Eakin agreed to “exonerate, indemnify, and keep indemnified” Westchester “from and against any and all liability for losses and/or expenses of whatsoever kind or nature, (including, but not limited to interest, court costs, and counsel fees) and from and against any and all such losses and/expenses” that Westchester “may sustain and incur” by reason of having executed the Bond or in connection with the Indemnity.

E. WHEREAS, the AOI further required Eakin, as indemnitee, to provide Westchester cash collateral in the amount of any reserve set by Westchester for any liability that exists or is asserted against Westchester under the Bond.

F. WHEREAS, On May 5, 2009, KBR filed a Demand for Arbitration with the American Arbitration Association (“AAA”) styled *Kellogg, Brown & Root Services, Inc. v. Sanders Brothers, Inc.*, No. 70 421 Y 0031009 (the “Arbitration”), asserting that Sanders breached the Subcontract by performing defective work, refusing to remedy the defective work, and forcing KBR to remedy the alleged defects.

G. WHEREAS, the arbitrator entered a final award in the Arbitration in favor of KBR and against Sanders dated March 25, 2010, in the amount of \$985,942.37, plus interest at 5 percent, commencing 10 days after the date of the award.

H. WHEREAS, KBR filed a motion to confirm the award in the United States District Court for the Southern District of Texas at Docket No. 10-cv-01441 and the Court confirmed the award and entered judgment against Sanders by Order dated July 30, 2010.

I. WHEREAS, KBR filed suit against Westchester in the United States District Court for the Southern District of Texas at Docket No. 10-cv-02632 (the “Texas Action”) seeking payment under the Bond.

J. WHEREAS, KBR commenced an AAA arbitration against Westchester styled *Kellogg, Brown & Root Services, Inc. v. Westchester Fire Insurance Company*, No. 70 742 00592 10 seeking enforcement of the Bond.

K. WHEREAS, KBR demanded that Westchester pay the judgment together with interest and attorney's fees in the amount of \$1,082,053.30.

L. WHEREAS, by letter dated July 12, 2010 (the "Demand Letter"), Westchester notified Eakin that it had established a reserve in the amount of \$1,000,000 for KBR's claim and that Eakin was required to immediately deposit with Westchester collateral in that amount.

M. WHEREAS, On August 11, 2010, Westchester paid \$1,082,053.30 to satisfy KBR's Bond claim.

N. WHEREAS, Eakin has breached the AOI by failing to deposit the collateral Westchester demanded and by failing to make any payment to Westchester for the amount paid to KBR or for Westchester's costs and expenses related to KBR's Bond claim.

O. WHEREAS, Westchester asserts that it has incurred attorneys' fees and expenses in connection with claims and lawsuits under the Westchester Bonds and in connection with this case.

P. WHEREAS, the parties desire to resolve all their respective claims and issues in this pending lawsuit without further litigation, costs, and expenses for the parties.

Q. WHEREAS, by this written agreement and in accordance with 28 U.S.C. § 636(c)(1), all parties consent to Judge Henry M. Herlong, Jr.'s jurisdiction over this matter and to conduct any and all proceedings related thereto, including but not limited to, approval of the settlement of this matter, enforcement of the settlement agreement of this matter, and the entry of judgment in this matter.

NOW THEREFORE, in consideration of the mutual promises, obligations, representations, covenants, and releases contained herein all of which is deemed good and sufficient consideration on the execution of this Stipulation, the parties each hereby stipulate and agree as follows:

1. The above recitals are incorporated herein as though set forth at length.
2. Contemporaneous with the execution of this Stipulation, Eakin shall give to Westchester a Confession of Judgment for the total amount of Westchester's claim(s) and in the form set forth on Exhibit A attached hereto and incorporated by reference herein.

Westchester may immediately file such Confession of Judgment in order to protect its interest and priority against subsequently filed judgments or liens. However, Westchester shall make no effort to collect upon said Judgment as long as Eakin shall make the payments set forth in Paragraph 3 below.

3. Eakin shall pay to Westchester, and Westchester shall accept from Eakin, the total sum of One Hundred Twenty Thousand and no/100 (\$120,000.00) Dollars according to the following schedule:

- (a) Fifteen Thousand and no/100 (\$15,000.00) Dollars on or before August 31, 2012;
- (b) Fifteen Thousand and no/100 (\$15,000.00) Dollars on or before January 31, 2013;
- (c) Thirty Thousand and no/100 (\$30,000.00) Dollars on or before December 31, 2013;
- (d) Thirty thousand and no/100 (\$30,000.00) Dollars on or before December 31, 2014; and

(e) Thirty Thousand and no/100 (\$30,000.00) Dollars on or before December 31, 2015.

In the event Eakin shall fail to make any payment as scheduled, Westchester shall give Eakin written notice of such default, and Eakin shall have fifteen (15) days from his receipt of such written notice to cure the default by making the scheduled payment in full. If Eakin shall fail to cure any such default after notice as provided herein, Westchester may take all legal and necessary steps to collect upon the judgment in the full amount, less offset credit for any prior payments by Eakin.

4. Upon successful completion of all scheduled payments by Eakin to Westchester as set forth in Paragraph 3 above, Westchester shall, at Eakin's sole option, either satisfy its judgment in full or assign same to Eakin or his designee.

5. Upon execution of this Stipulation and the Confession of Judgment provided for herein, Westchester shall cause this action to be immediately dismissed with prejudice.

6. This Stipulation shall be governed by South Carolina law and this Court shall retain jurisdiction to enforce any term of this Stipulation.

7. This Stipulation may not be modified, changed, or amended except in writing. A facsimile signature or photocopied signature on this Stipulation shall be deemed valid and binding and shall be deemed to be an original signature.

8. Notices hereunder shall be given, by overnight delivery and email to the respective attorneys for the parties at the following addresses:

Parties

Westchester Fire Insurance Company

Attorneys

Robert McL. Boote, Esquire

Cozen O'Connor

1900 Market Street

Philadelphia, Pennsylvania 19103

Samuel F. Eakin

Donald C. Coggins, Jr., Esquire
Griffin Littlejohn Lynch, Esquire
Harrison, White, Smith & Coggins, P.C.
178 West Main Street (29306)
Post Office Box 3547
Spartanburg, South Carolina 29304

9. This Stipulation may be executed in one or more counterparts, which together shall constitute one original.

Dated August 10, 2012.

s/Kimila L. Wooten

L. Franklin Elmore (Fed. ID No. 718)
Kimila L. Wooten (Fed. ID No. 5525)
Elmore Goldsmith, PA
55 Beattie Place, Suite 1050 (29601)
Post Office Box 1887
Greenville, South Carolina 29602
(864) 255-9500-Telephone
(864) 255-9505-Facsimile
felmore@elmoregoldsmith.com
kwooten@elmoregoldsmith.com
Attorneys for Plaintiff, Westchester Fire Insurance Company

s/Donald C. Coggins, Jr.

Donald C. Coggins, Jr. (Fed. ID # 198)
Griffin Littlejohn Lynch (Fed. ID No. 9580)
Harrison, White, Smith & Coggins, P.C.
178 West Main Street
Post Office Box 3547 (29304)
Spartanburg, South Carolina 29306
(864) 585-5100-Telephone
dcoggins@spartanlaw.com
glynch@spartanlaw.com
Attorneys for Defendant Samuel F. Eakin